

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

09/16/2002

CLERK OF THE COURT
FORM L000

HONORABLE MICHAEL D. JONES

P. M. Espinoza
Deputy

LC 2000-001059

FILED: _____

KARL DEWEY HINES

THOMAS A SCARDUZIO

v.

STATE OF ARIZONA

LISA B BARNES

FINANCIAL SERVICES-CCC
PHX CITY MUNICIPAL COURT
REMAND DESK CR-CCC

MINUTE ENTRY

PHOENIX CITY COURT

Cit. No. #8966390

Charge: DRIVING WHILE INTOXICATED

DOB: 01/11/66

DOC: 11/06/98

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

This matter has been under advisement since August 19, 2002 which was the time scheduled for oral argument. This Court has

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considered and reviewed the record of the proceedings from the Phoenix City Court, arguments of counsel and the Memoranda submitted by counsel.

Appellant, Karl Dewey Hines, was accused of committing the crimes of Driving While Under the Influence of Intoxicating Liquor, a class 1 misdemeanor in violation of A.R.S. 28-1381(A)(1); and Squealing Tires, a civil traffic violation in violation of Phoenix City Code Section 36-69. The alleged offenses occurred within the City of Phoenix on November 6, 1998. Appellant entered a plea of not guilty and later filed a Motion to Suppress, challenging whether the Phoenix Police Officers had a "reasonable suspicion" to stop his vehicle. Appellant contended that his Fourth and Fourteenth Amendment Rights were violated. The trial court conducted an evidentiary hearing on this motion on November 15, 2001. At the conclusion of the evidentiary hearing, the trial court denied Appellant's motion finding no Fourth or Fourteenth Amendment violation of Appellant's rights.¹ The next day, at the time scheduled for commencement of Appellant's jury trial, Appellant's counsel reurged the Motion to Suppress and argued that the case should be dismissed on constitutional vagueness grounds. The trial judge denied this motion.² Thereafter, the parties waived their right to a jury trial and presented the case to the court on stipulated evidence. Appellant was found guilty of violating the crime of Driving While Under the Influence of Intoxicating Liquor, in violation of A.R.S. Section 28-1381(A)(1), and not responsible of violating the Phoenix Code Section 36-69 (Squealing Tires). Appellant filed a timely Notice of Appeal in this case.

Appellee argues that Appellant has waived the constitutional issues, concerning the alleged vagueness of A.R.S. Section 28-1594 and Phoenix City Code Section 36-40.2, by his failure to raise this issue in a timely fashion. Rule 16.1(b), Arizona Rules of Criminal Procedure, requires that

¹ R.T. of November 15, 2001, at page 37.

² R.T. of November 16, 2001, at page 56.

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motions be filed "no later than 20 days prior to trial." The first time the constitutional vagueness issue was raised was the morning of trial. Clearly, Appellant's motion was not timely filed.

Generally, the failure to raise a claim before the trial court in a timely fashion waives the right to appellate review of that claim, even if the alleged error is of constitutional dimension.³ However, this is a procedural rule which does not affect the jurisdiction of an appellate court.⁴ A constitutional issue may be raised and addressed for the first time on appeal where the issue is of state-wide importance or significance, is raised in the context of a fully developed record, the issues do not turn on resolution of disputed facts, and the issues have been fully briefed by all parties.⁵ Consideration of constitutional issues that are raised for the first time on appeal is discretionary.⁶ Arizona Law presumes that statutes are constitutional, and any party asserting the unconstitutionality of a statute has the burden of clearly demonstrating its constitutional infirmity. Whenever possible, Arizona courts construe statutes so as to avoid rendering them unconstitutional, and resolve any doubts in favor of a finding of constitutionality.⁷

This Court concludes, based upon the opportunity of both parties to submit excellent memoranda on the constitutional issues that the constitutional issues are of state-wide concern and are appropriately before this court.

³ State v. Lefevre, 193 Ariz. 385, 389, 972 P.2d 1021, 1025 (App. 1999).

⁴ Larsen v. Nissan Motor Corporation in USA, 194 Ariz. 142, 978 P.2d 119 (App.1999).

⁵ Id.; Jiminez v. Sears, Roebuck and Company, 183 Ariz. 399, 904 P.2d 861 (1995); Gosewisch v. American Motor Company, 153 Ariz. 400, 737 P.2d 376 (1987); Cutter Aviation, Incorporated v. Arizona Dept. of Revenue, 191 Ariz. 485, 958 P.2d 1 (App.1997).

⁶ Hawkins v. Allstate Insurance Company, 152 Ariz. 490, 733 P.2d 1073 (1987).

⁷ Larsen v. Nissan Motor Corporation in USA, supra.

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A.R.S. Section 28-1594 and Phoenix City Code Section 36-40.2 are both nearly identical to A.R.S. Section 13-3883(B). All three legislative enactment's authorize peace officers to stop and detain a person "as is reasonably necessary to investigate an actual or suspected violation"⁸ of any traffic violation. Appellant argues that the statute and city code provisions are vague because they give the police the authority to stop for "suspected violation of any traffic offense"⁹ without regard to a requirement that the police have a "reasonable suspicion" of suspected criminal activity or violation of a traffic offense. Unfortunately, Appellant has ignored the requirement in both statutes and the Phoenix City Code provisions which require as a prerequisite to a stop and detention that there be a reasonable necessity to investigate on the part of the police.

The trial court found that Appellant had failed to carry his burden of proof in showing that the statute was applied unconstitutionally to him, and that in this case there was a clear and reasonable belief on the part of the officer that Appellant's vehicle was violating a traffic offense:

Alright. Since it is the defense that is attacking the constitutionality of the statute, the defense bears the burden of proving that the statute is unconstitutional, and I don't believe that the defense has done that.

In this case, I believe that the officer did have reasonable articulable suspicion to at least stop the Defendant's vehicle.¹⁰

⁸ This language is identical in A.R.S. Section 13-3883(B), 28-1594, and Phoenix City Code Section 36-40.2.

⁹ Appellant's memorandum at page 5.

¹⁰ R.T. of November 16, 2001, at page 56.

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This Court finds, as a matter of law, that the trial court did not err in denying Appellant's Motion to Dismiss, which was a reurging of a prior Motion to Suppress, finding that A.R.S. Section 28-1594 and Phoenix City Court Section 36-40.2 were not unconstitutionally vague. This Court concurs with the trial court's finding.

Appellant also argues that in this case the Phoenix Police lacked "reasonable suspicion" to stop his vehicle. Appellant argues insufficient evidence of a "reasonable suspicion" was presented to the trial court which would justify the stop of his vehicle. An investigative stop is lawful if the police officer is able to articulate specific facts which, when considered with rational inferences from the facts, reasonably warrant the police officer's suspicion that the accused, committed, or was about to commit, a crime.¹¹ These facts and inferences when considered as a whole the ("totality of the circumstances") must provide "a particularized and objective basis for suspecting the particular person stopped of criminal activity."¹²

A temporary detention of an accused during the stop of an automobile by the police constitutes a "seizure" of "persons" within the meaning of the Fourth Amendment even if the detention is only for a brief period of time.¹³ In Whren¹⁴, the United States Supreme Court upheld the District's Court denial of the Defendant's Motion to Suppress finding that the arresting officers had probable cause to believe that a traffic violation had occurred, thus the investigative detention of the Defendant was warranted. In that case, the police officers admitted that they used the traffic violations as a pretext to search the vehicle for evidence of drugs. The Court rejected the

¹¹ Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968); State v. Magner, 191 Ariz. 392, 956 P.2d 519 (App. 1988); Pharo v. Tucson City Court, 167 Ariz. 571, 810 P.2d 569 (App. 1990).

¹² United States v. Cortez, 449 U.S. 411, 417-18, 101 S.Ct. 690, 695, 66 L.Ed. 2d 621, (1981).

¹³ Whren v. United States, 517 U.S. 806, 809-810, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996).

¹⁴ Id.

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Defendant's claim that the traffic violation arrest was a mere pretext for a narcotic search, and stated that the reasonableness of the traffic stop did not depend upon the actual motivations of the arresting police officers. Probable cause to believe that an accused has violated a traffic code renders the resulting traffic stop reasonable under the Fourth Amendment.¹⁵

The sufficiency of the legal basis to justify an investigative detention is a mixed question of law and fact.¹⁶ An appellate court must give deference to the trial court's factual findings, including findings regarding the witnesses' credibility and the reasonableness of inferences drawn by the officer.¹⁷ This Court must review those factual findings for an abuse of discretion.¹⁸ Only when a trial court's factual finding, or inference drawn from the finding, is not justified or is clearly against reason and the evidence, will an abuse of discretion be established.¹⁹ This Court must review *de novo* the ultimate question whether the totality of the circumstances amounted to the requisite reasonable suspicion.²⁰

In this case the trial judge explained her ruling denying Appellant's Motion to Suppress. The trial judge explained:

At this time the defense Motion to Suppress is denied. The issue is not whether this court would find the Defendant responsible for violating Phoenix City Code Section 36-69(squealing Tires) by a preponderance of the evidence.

¹⁵ Id.

¹⁶ State v. Gonzalez-Gutierrez, 1987 Ariz. 116, 118, 927 P.2d 776, 778 (1996); State v. Magner, Supra.

¹⁷ Id.

¹⁸ State v. Rogers, 186 Ariz. 508, 510, 924 P.2d 1027, 1029 (1996).

¹⁹ State v. Chapple, 135 Ariz. 281, 297, 660 P.2d 1208, 1224 (1983); State v. Magner, 191 Ariz. at 397, 956 P.2d at 524.

²⁰ State v. Gonzalez-Gutierrez, 187 Ariz. at 118, 927 P.2d at 778; State v. Magner, 191 Ariz. at 397, 956 P.2d at 524.

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Pursuant to Phoenix City Code Section 36-40.2, I do find that the officer was entitled to stop the Defendant's truck to investigate an actual or suspected violation of Phoenix City Code Section 36-69, Unnecessary Vehicle Noise.²¹

And the trial judge later denied Appellant's renewed Motion to Suppress/Dismiss:

In this case, I believe that the officer did have reasonable articulable suspicion to at least stop the Defendant's vehicle. Certainly the noise that was coming from the Defendant's car was sufficient to draw the officer's attention, draw him away from what he had been doing.

Now it ultimately, as in any traffic violation, there may be other things which in determining whether someone is responsible or not responsible for a civil traffic that the court would take into account. But certainly there was sufficient evidence of a violation of Phoenix City Code Section 36-69 that the officer would be entitled to at least stop the Defendant's vehicle and investigate.²²

The trial judge's ruling is supported by the record in this case. Phoenix Police Officer John Garza testified that he explained to Appellant after his arrest that he was stopped because of the squealing of his tires, and Appellant agreed that his tired squealed.²³ This Court determines *de novo* that the

²¹ R.T. of November 15, 2001, at page 37.

²² R.T. of November 16, 2001, at pages 56-57.

²³ R.T. of November 15, 2001, at pages 23-24.

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facts cited by the trial judge, and the facts contained in the trial court's record, do establish a reasonable basis for the Phoenix Police officers to have stopped Appellant. The trial judge did not err in denying Appellant's Motion to Suppress/Dismiss.

IT IS THEREFORE ORDERED affirming the judgment of guilt and sentence imposed by the Phoenix City Court.

IT IS FURTHER ORDERED remanding this case back to the Phoenix City Court for all further and future proceedings in this case.